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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91189418
Party	Defendant Phoenix 2008 LLC
Correspondence Address	BRIAN J. HURH DAVIS WRIGHT TREMAINE LLP 1919 PENNSYLVANIA AVE NW STE 200 WASHINGTON, DC 20006-3402 UNITED STATES brianhurh@dwt.com
Submission	Opposition/Response to Motion
Filer's Name	Brian J. Hurh
Filer's e-mail	Brianhurh@dwt.com
Signature	/brian j. hurh/
Date	11/02/2009
Attachments	PHOENIX RESPONSE_EXHIBIT G.PDF (8 pages)(504931 bytes)

EXHIBIT G

October 7, 2009

Daniel E. Bruso, Esq.
Cantor Colburn LLP
20 Church Street
22nd Floor
Hartford, CT 06103

Dear Mr. Bruso,

On behalf of Phoenix 2008 LLC ("Phoenix"), I am writing in response to Speed Channel, Inc.'s ("Speed Channel") Motion to (1) Compel Applicant's Responses to Speed Channel's First Set of Requests for Production of Documents and its First Set of Interrogatories; (2) Test the Sufficiency of Applicant's Responses to Speed Channel's Requests for Admissions; and (3) Suspend (hereinafter the "Motion"), filed with the Trademark Trial and Appeal Board ("Board") on September 28, 2009.

As an initial matter, Phoenix disputes the Motion's accusations that it is withholding responsive information or documents. Phoenix's responses to Speed Channel's discovery requests, provided on July 13, 2009, were both accurate and fully responsive, and its objections were well grounded and asserted in good faith. While Phoenix reserved the right to supplement its responses should further investigation disclose relevant information (a duty that applies equally to both parties), Phoenix's lack of further responses does not in any way indicate a "refusal" to supplement as required.

In an effort to facilitate the progress of discovery and this proceeding generally, Phoenix is willing to produce certain other documents or things in its possession or control that were not in the scope of Speed Channel's discovery requests, but that nonetheless may relate to the matters at issue in this proceeding, and will also produce certain other documents or things pursuant to its duty to supplement as explained above. In so doing, Phoenix maintains its previously asserted responses and objections to Speed Channel's initial discovery requests, and does not in any way waive any of the objections that it has asserted or may assert in this proceeding. Some of these documents include proprietary and confidential information and, thus, will be produced only upon execution and Board approval of a protective agreement. Attached hereto is a revised draft of the Parties' previous draft protective agreement, which we can discuss further at your convenience.

Further, and contrary to the allegations in the Motion, Phoenix has never stated or even suggested that it would not provide a privilege log to Speed Channel. As you are well

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aware, you and I have discussed on numerous occasions that the Parties would exchange privilege logs. Accordingly, Phoenix reaffirms its agreement to produce a privilege log, subject to Speed Channel's agreement to do the same. We can discuss a mutually convenient time for the Parties to exchange privilege logs.

The documents, things and privilege log that Phoenix will produce, subject to the foregoing conditions, will provide Speed Channel with the full scope of information and documents that are in Phoenix's possession and/or control that in any way arguably fall within Speed Channel's discovery requests, whether or not specifically requested by Speed Channel. Consequently, Speed Channel's Motion is now moot and I expect that it will be withdrawn, as we discussed. Speed Channel's refusal to withdraw its Motion under these circumstances would be unreasonable.

In addition, as we also discussed, in light of the submittal of Mr. Williams' signature and affirmation, there no longer is any need for my deposition, and I expect you to withdraw that notice. Furthermore, we still need to agree upon an appropriate time and place for Mr. Williams' deposition. I sent you some possible dates in an earlier email; please let me know if you have had a chance to determine whether any of those dates work (subject to Mr. Williams' availability, which I am in the process of confirming).

Please confirm Speed Channel's agreement to the terms of this letter, and do not hesitate to contact me to discuss any of the foregoing.

Sincerely,

A handwritten signature in black ink, appearing to read "B. Hurh", with a stylized flourish at the end.

Brian J. Hurh

Counsel for Phoenix 2008 LLC

Hurh, Brian

From: Bruso, Daniel [DBruso@CantorColburn.com]
Sent: Monday, October 12, 2009 5:11 PM
To: Hurh, Brian
Cc: Mayhew, Dawn
Subject: RE: Speedvision
Follow Up Flag: Follow up
Flag Status: Completed
Attachments: 10.12.09 letter to Hurh.pdf

Brian,

I write in response to your October 7, 2009, e-mail.

I fail to see any urgency in our need to respond. By your own admission, you still claim to have a week to respond. Additionally, your client's "offer" is utterly unacceptable.

Regardless, and as a courtesy, attached you will find Speed Channel's response to your October 7, 2009, letter. A hard copy will follow.

Please contact me if you care to discuss this matter.

-----Original Message-----

From: Hurh, Brian [mailto:BrianHurh@dwt.com]
Sent: Monday, October 12, 2009 10:53 AM
To: Bruso, Daniel
Subject: Speedvision

Daniel,

Please confirm receipt of Phoenix's letter last week in which we offered to provide you with documents and/or things. It is imperative that you respond today, as our Reply to the Motion to Compel is due next Monday, October 19. If your client needs more time to consider our offer, we ask that Speed consent to an extension of time for Phoenix to submit its Reply to the Board. We feel that an additional 30 days would be appropriate to allow the parties to negotiate a mutual resolution to this current discovery dispute before the Reply is due, subject to further extensions to accommodate continuing negotiations. Since all other deadlines are suspended at this time, the 30-day extension would not be prejudicial to Speed.

Also, with respect to Mr. Williams' deposition, please let me know whether any of the days I mentioned work for you. For your convenience, those dates are: Oct 27 or 28, and Nov 3, 6, 10, or 11.

Brian

Brian Hurh | Davis Wright Tremaine LLP

1919 Pennsylvania Avenue NW, Suite 200 | Washington, DC 20006
Tel: (202) 973-4279 | Fax: (202) 973-4499
Email: brianhurh@dwt.com | Website: www.dwt.com

Anchorage | Bellevue | Los Angeles | New York | Portland | San Francisco | Seattle | Shanghai | Washington, D.C.

11/2/2009



Cantor Colburn LLP

Intellectual Property Attorneys

HARTFORD

20 Church Street
22nd Floor
Hartford, CT 06103
phone: 860-286-2929
fax: 860-286-0115

WASHINGTON, D.C.

1800 Diagonal Road
Suite 510
Alexandria, VA 22314
phone: 703-236-4500
fax: 703-236-4501

ATLANTA

1180 Peachtree Street
Suite 2050
Atlanta, GA 30309
phone: 404-607-9991
fax: 404-607-9981

DETROIT

201 W. Big Beaver Road
Suite 1101
Troy, MI 48064
phone: 248-524-2300
fax: 248-524-2700

www.cantorcolburn.com

Daniel E. Bruso

dbruso@cantorcolburn.com

October 12, 2009

VIA ELECTRONIC AND FIRST CLASS MAIL

Brian J. Hurh, Esq.
Davis Wright Tremaine LLP
1919 Pennsylvania Avenue NW
Suite 200
Washington, DC 20006-3402

Re: *Speed Channel, Inc. v. Phoenix 2008 LLC*,
Trademark Trial and Appeal Board Opposition No. 91189418
Our Reference No.: FEG0573OPPUS

Dear Mr. Hurh:

We write in response to your October 7, 2009, letter regarding Phoenix 2008 LLC's ("Phoenix") continuing failure to properly respond to Speed Channel, Inc.'s ("Speed Channel") Discovery Requests, the issues raised in Speed Channel's pending Motion to Compel, and your October 12, 2009, e-mail.

We send this letter pursuant to Fed. R. Evid. 408, and without waiver or prejudice of any right held by our client at law or equity.

As a preliminary matter, we note that Phoenix has yet to produce a single document. We further note that Phoenix has failed to supplement its responses to Speed Channel's Discovery Requests, and that it has not produced a privilege log. We also note that your October 7, 2009 letter identifies additional categories of responsive documents and things that must be produced in order for Phoenix to comply with its discovery obligations and resolve the issues presented in Speed Channel's pending Motion to Compel.

Speed Channel is puzzled by Phoenix's "offer" to resolve the pending discovery dispute. Phoenix seems to believe that Speed Channel must negotiate with Phoenix in order to obtain responsive documents and things, a privilege log and discovery responses that are not replete with frivolous and ill-founded objections. This is not the case.

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Phoenix's discovery obligations are set forth in the TBMP, the Board's rulings and the decisions of the Federal Courts that have considered these issues. Each of these bodies have recognized that Phoenix has an affirmative obligation to carry out its discovery obligations, which include the obligation to conduct a good faith investigation when responding to discovery, the obligation to produce relevant, responsive documents, the obligation to identify privileged documents and the obligation to refrain from asserting frivolous objections. The fact that Phoenix refuses to comply with these obligations forms the basis for Speed Channel's Motion to Compel. Moreover, the fact that Phoenix has elected to engage in *ad hominem* personal attacks, while regrettable, does not alter the foregoing obligations.

Speed Channel is willing to discuss an effective means of resolving the instant dispute. Unfortunately, Phoenix's October 7, 2009, letter provides no basis for doing so, because the letter demonstrates that Phoenix is still attempting to avoid complying with its discovery obligations. In particular, in the second paragraph on page 1 of its letter, Phoenix denies that it is withholding responsive documents and things. However, in the letter's third paragraph, Phoenix offers to produce "certain other documents or things in its possession that were not in the scope of Speed Channel's discovery requests, but that nonetheless may relate to the matters at issues in this proceeding, and will **also produce certain other documents or things pursuant to its duty to supplement as explained above.**" (emphasis supplied). Phoenix fails to identify these documents and things, identify the discovery requests to which they are responsive or explain why they fall outside the scope of Speed Channel's Discovery Requests. In doing so, Phoenix ignores the comprehensive nature of Speed Channel's Discovery Requests, as well as Phoenix's ongoing obligations to supplement its discovery responses.

Phoenix's comments regarding the confidential nature of the aforementioned production fail to justify its refusal to produce them, for at least two reasons. First and as you should be aware, the Board has ordered that its "Standardized Protective Order" applies in all Board proceedings. There is no need for a separate Protective Order unless the parties agree otherwise.

Second, even a cursory review of Phoenix's discovery responses reveals that Phoenix failed to object to any of Speed Channel's Discovery Requests based upon the allegedly confidential nature of the requests. Thus, even if Phoenix were entitled to raise confidentiality as the basis for one or more of its objections, and it is not, Phoenix's failure to raise the objection would

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constitute a waiver of the objection. In any event, Speed Channel is entitled to this information.

Regardless, and as I informed you earlier today, Speed Channel agrees to the terms of the Protective Order that you provided earlier today. We await your finalized version.

In the meantime, Speed Channel categorically rejects Phoenix's "carrot and stick" approach to discovery. Instead, Speed Channel demands that Phoenix produce all of the documents identified in its October 12, 2009, letter, and that it fully comply with Speed Channel's September 10, 2009 letter.

Your suggestion that Speed Channel must withdraw its pending Motion to Compel is misplaced. Speed Channel filed its Motion after Phoenix decided to ignore its discovery obligations. Speed Channel provided you with a detailed analysis of the deficiencies in Phoenix's discovery responses, and identified the specific relief that it seeks from your client. Your client's failure to respond substantively to Speed Channel's efforts left Speed Channel with no choice except to seek relief from the Board. Your client's continued failure to comply with its discovery obligations leaves Speed Channel with no choice except to prosecute the Motion to Compel, and to obtain a Board Order directing your client to comply with its discovery obligations.

Your suggestion that Speed Channel's refusal to withdraw its Motion to Compel is somehow "unreasonable" lacks merit. Speed Channel will withdraw its Motion to compel if, and only if, Phoenix provides Speed Channel with the relief that it seeks. Until it does, Speed Channel is entitled to obtain that relief from the Board by prosecuting its Motion.

Based on the foregoing, Speed Channel declines to withdraw its Motion to Compel. Speed Channel will reconsider its position if your client completely complies with Speed Channel's Motion to Compel and its September 10, 2009, Letter. Additionally, your client must produce the additional documents identified in your October 7, 2009, letter and produce any other responsive documents and things. Of course, Phoenix must also produce a privilege log and supplement its discovery responses by removing all of its frivolous objections.

With regard to the upcoming depositions, Speed Channel maintains that your signature on Phoenix's answers to Speed Channel's Interrogatories renders you a fact witness who is subject to deposition and disqualification. Indeed, based

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on our discussions and Phoenix's discovery responses, Speed Channel regards you as the most competent fact witness available to testify on Phoenix's behalf.

Notwithstanding the foregoing, Speed Channel will consider postponing or canceling your deposition to the extent that Phoenix and Mr. Williams are able to testify competently during their own depositions. Of course, in order for this to occur, Mr. Williams and Phoenix must be able to testify regarding all responsive documents, things and information, together with all confidential documents, the basis for any privilege claims, the nature of all allegedly privileged documents, the good faith basis for Phoenix's objections to any of Speed Channel's discovery requests and the investigation that Phoenix conducted when it investigated Speed Channel's Discovery Requests.

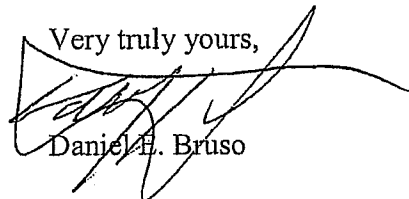
Even if Speed Channel cancels your deposition, it remains clear that Phoenix waived any privilege when it permitted you to sign its answers to Speed Channel's Interrogatories. Consequently, Speed Channel reserves its right to examine Phoenix and Mr. Williams regarding your involvement in any matter identified in Speed Channel's Interrogatories.

With regard to your inquiry regarding Phoenix's and Mr. William's deposition, we propose to take both depositions in our Hartford office. If it becomes necessary to take your deposition, we are willing to proceed in our Alexandria, Virginia office. However, we are willing to consider alternative locations for any of these depositions.

I am in the process of confirming the deposition dates, and will respond in due course.

Thank you for your time and attention to these issues. Please contact me if any questions arise.

Very truly yours,



Daniel E. Brusio

DEB/